

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2009 HCV2249

BETWEEN	FREDERICK LEIGHTON	CLAIMANT
AND	KINGSTON WHARVES LIMITED	1 ST DEFENDANT
AND	GRANTLEY STEPHENSON	2 ND DEFENDANT

Ravil Golding instructed by Lyn-Cook Golding for the Claimant

Michael Hylton QC and Kalaycia Clarke instructed by Michael Hylton & Associates for the Defendants

SUMMARY JUDGMENT

Whether pension scheme discontinued or wound-up - Whether pension benefits should have been transferred to another pension plan - Whether trustee of pension scheme was negligent or breached fiduciary duty - Whether alleged oral discussions can contradict the terms of the written contract.

Heard: 23rd November and 9th December 2009

Sinclair-Haynes J

This application for Summary judgment is made by Kingston Wharves Limited (first defendant) and Grantley Stephenson (second defendant) against an action instituted by Mr. Frederick Leighton (claimant) for damages.

The claimant seeks damages against the first defendant for:

- a. unilaterally changing the terms of the pension scheme which it operated on behalf of the claimant and other employees, thereby resulting in loss to him;

- b. breach of contract in that the first defendant has refused and/or neglected to compensate him for work which he did for the first defendant as a consultant on a project known as the Facility Fee project.

He also seeks damages against the second defendant as trustee of Kingston Wharves Limited Pension Plan for negligence and/or breach of fiduciary duty or failure to properly administer the pension scheme thereby resulting in loss of his pension rights and entitlements.

Facts

Mr. Fredrick Leighton commenced employment with the first defendant in January 1970. The first defendant operated a Superannuation Fund Pension Scheme ((1951) Pension Plan) for the benefit of its employees. The claimant contributed to that scheme.

In 1971, the (1951) Pension Plan was frozen by the government of Jamaica and new subscribers were unable to subscribe to that Plan. Employees who commenced employment after the freezing of the 1951 Superannuation Plan became members of the (1978) Kingston Wharves Limited Pension Plan (1978) Pension Plan). Both the (1951) and (1978) Pension Plans operated concurrently until August 1994 when they were both terminated. They were governed by their respective Trust Deeds and Rules.

In 1995 the employees of Kingston Wharves Limited, including the claimant, were made redundant. Kingston Wharves and Western Terminals Limited merged. A new Kingston Wharves Limited Pension Scheme was implemented in January 1995, known as the Kingston Wharves Limited (1995) Pension Plan, (1995) Pension Plan. This Plan was also governed by its Rules and Trust Deeds. It covered the former employees

of Kingston Wharves and Western Terminals who were re-employed by the merged companies.

Upon the termination of the (1951) Plan in August 1994, the employees who were re-employed and who were covered by the (1951) Plan, including the claimant, were given their accumulated benefits. The claimant received \$1,041,448.61. However, the employees who were covered by the (1978) Pension Plan and who were re-employed were given three options pursuant to the terms of the (1978) Pension Plan regarding how their Pension Fund entitlement under the (1978) Plan should be treated. They could elect to:

- a. have their accumulated contributions with interest paid to them;
- b. receive a deferred vested Pension Plan;
- c. authorize the trustees of the Plan to transfer the lump sum to the trustees of the Kingston Wharves.

The employees who chose option C were able to maximize their pension benefits because in calculating their pension benefits upon their retirement, years of service and income at the age of their retirement were “ported” into the (1995) Plan. The (1951) Plan, however, contained no provision for portability.

The (1951) Plan contained provisions which conferred upon the trustees, the power to alter, amend, cancel or add to the rules of the Trust Deed. The trustees did not exercise any of these powers. The claimant was a trustee of the (1951) Pension Plan and he later became a director of the (1995) Pension Plan.

The Claimant's Claim

He complains that the (1951) Pension Plan was not properly wound-up.

He questions the validity of the (1995) Plan and the options given to the employees under the (1978) Plan. Further, he contends that the trustees of (1951) Plan:

- a. failed or did not act in the best interest of the employees covered by the (1951) Plan;
- b. failed to take any or adequate steps to (carry out) the (1951) Plan under which the claimant's full pension benefits would have been assured at the time of his retirement;
- c. failed to take any adequate steps to carry out the (1951) Plan under which they could amend or alter to provide for the portability of the claimant's pension benefits, rights and years of service into the (1995) Plan.

He also contends that the first defendant unilaterally changed the terms of his employment thereby depriving him of a substantial portion of his full pension entitlement upon his retirement in June 2005.

As a result of the first defendant's action and failure to act he has suffered loss and damages. He claims the sum of \$22 million which represents the diminution in his pension benefits. He also seeks to recover the sum of \$18 million which represents 10% of the first gross annual income from the Facility Fee.

Re the Claimant's Facility Fee Claim

On the 5th February 2003 by virtue of a written agreement with the first defendant, the claimant was employed as a consultant. He was offered a six-month contract on the 29th December 2004, by way of a letter which contained the specific tasks he was assigned. That agreement was subsequently terminated on the 30th June 2005.

At the expiration of that contract, the claimant continued his consultancy with the first defendant until June 2008 on the terms and conditions which were contained in the letter of December 29, 2004.

Between the years 2006 – 2007, the claimant developed and implemented for the first defendant a revenue-earning project known as the Facility Fee. The claimant contends that the Facility Fee was conceptualized, developed and implemented by him on his own initiative, outside the scope of the specific tasks assigned to him under the contract. During its first year of the implementation of the Facility Fee, revenue of One Hundred and Eighty Million Dollars (\$180 million) was derived. According to the claimant, the usual consulting fee for such a project is between 10 – 12% of the gross annual income of the project.

He contends that it was expected that he would be paid for work done on the project. The first defendant has, however, failed and or refused to compensate him despite several demands. He therefore claims against the first defendant, the sum of \$18 million which represent 10% of the first gross annual income from the Facility Fee.

The Defendants' Case

The defendants strongly contend that the claimant was duly paid all to which he was entitled. It is the defendants' contention that the terms of the pension plans and their respective rules render the claimant's claim that he is entitled to outstanding pension benefits, hopeless.

Submissions by Mr. Michael Hylton QC on behalf of the Defendants

Mr. Michael Hylton QC submits that the (1951) Pension Plan ceased being a continuing pension plan in 1994. He relies on the Privy Council's decision in **Air Jamaica Ltd. and others v Charlton and others** (1999) 54 WIR 359. He submits that the (1951) Pension Plan was closed as no new subscribers were allowed. In 1994 the company discontinued its contributions to the said Plan and ceased taking contributions

from subscribers. The Plan was therefore discontinued. The claimant was made redundant and was paid the money due to him under the (1951) Pension Plan and Rules.

He contends that the claimant's chances of success are fanciful because the trustees acted in accordance with the terms of the Plan and the Rules. The trustees were powerless to transfer the claimant's accumulated benefits to the (1995) Pension Plan or any other pension fund because the rules did not permit its transfer to any other pension plan. The claimant was paid what was due to him under the provisions of the (1951) Pension Plan and Rules.

He submits that the claim against the second defendant for 'breach of fiduciary duty' and for 'failing to transfer the claimant's benefits from the (1951) Pension Plan into the (1995) Pension Plan' has no reasonable chance of succeeding for the following reasons:

1. the second defendant was never a trustee of the (1951) Pension Plan;
2. the trustees of the (1951) Pension Plan were not required or permitted to transfer any subscriber's benefits into the (1995) Pension Plan;
3. the (1995) Pension Plan provides that trustees cannot be personally liable for any act or omission whilst purporting to act as trustee except for fraud or dishonesty which is not alleged.

His submission regarding the Facility Fee Scheme Claim

Mr. Hylton submits that the claimant's claim is unsupported and contradicted by contemporaneous documents. The claimant was offered employment as a consultant to the company. The terms on which he was to be compensated were set out in the said letter. The agreement was for a fixed sum. It included no provision for any additional payment. The claimant accepted the terms of the agreement and acted on it. The

documents he tendered showed that he charged for work he performed on the Facility Fee project and was duly paid.

He submits that the claimant cannot now rely on alleged oral discussions with the second defendant to contradict the terms of the written document. He relies on the statement of the learned authors of **Halsburys Laws of England** (4th edition, Volume 9 paragraph 622) and the case of **Victor Lowe v National Investment Bank of Jamaica** Privy Council Appeal No. 47 of 2007 delivered May 6, 2008.

He submits that even if the allegations are credible, such allegations would be inadmissible to contradict the terms of the document. He, however, submits that the allegations are not credible in the face of the claimant's own invoices.

The Law

Rule 15.2 (a) of the Civil Procedure Rules 2002 empowers the Court to grant summary judgment on a claim if the claimant has no real prospect of succeeding on the claim. The question is whether there is a realistic prospect of the claimant succeeding on his claim (see **Swain and Hillman** (2001) 1 ALL ER 91).

Whether the Pension Plan was properly wound-up

The pertinent issue is whether the (1951) Plan was discontinued, and not whether it was properly wound up. The Privy Council's decision in **Air Jamaica Ltd. and others v Charlton and others** (1999) clarifies the circumstances under which a Pension Plan is discontinued. Lord Millett in delivering the unanimous decision of the Board, said:

“Before their Lordships, counsel for the company and the Attorney-General strenuously contended that the plan had not been discontinued because (a) the business of Air Jamaica was still being carried on by the company; only the shareholders had changed; and (b) pensions were still in payment

under continuing trusts. These contentions are misconceived. A pension scheme can be discontinued without discontinuing the employers' business; and discontinuing a pension scheme is not the same as winding up.

A pension scheme is a continuing scheme under which new members are continually joining and existing members leaving or taking their benefits. In order to wind up such a scheme three steps must be taken, although simultaneously. First, the scheme must be closed to new entrants. If no further steps are taken, the scheme continues as a closed scheme, contributions continuing to be paid in respect of existing members but no new members being admitted. Secondly, contributions must cease to be paid in respect of existing members, who will either have been made redundant or have been transferred to a new scheme. At this stage the scheme is discontinued, since it ceases to be a continuing one. But pensions in payment continue to be payable until the third stage is reached and the scheme is finally wound up. It follows that all that was necessary to discontinue the pension plan was that the company cease to deduct contributions from its employees."

Regarding the instant case there is no disputing that:

- (a) in 1971, the (1951) Pension Plan was closed to new entrants;
- (b) in 1994, the company ceased making contributions;
- (c) in that same year the claimant was made redundant.

In light of the very clear decision of the Privy Council, there can be no serious challenge of the fact that the (1951) Pension Plan was discontinued.

Whether the Claimant is entitled to outstanding pension benefits

There is no issue taken that the claimant was paid the sum of \$1,041,448.61 upon being made redundant in 1994. The said sum represented his accumulated benefits under the (1951) Pension Plan. The crux of the matter is whether the Trustees were under an

obligation, upon the termination of the (1951) Pension Plan, to afford him the option which was given to the members of the (1978) Pension Plan of transferring his accumulated benefits to the (1995) Pension Plan.

Has he, as a result of their failure to afford him that option, suffered loss of \$22,000,000.00, which he claims could have accumulated if he had been given that option?

Ruling

The claimant's claim that he suffered loss because unlike the members of the (1978) Pension Plan, he was denied the option of transferring his benefits to the (1995) Pension Plan is misconceived. The (1951) Pension Plan was governed by rules and a trust deed. The said deed and rules conferred no power on the trustees which permitted the transfer of benefits that accrued under that Plan to any other Plan.

There is no provision in the (1951) Pension Plan which conferred upon the trustees of that Plan the power to transfer the claimant's accumulated benefits into any other Pension Plan. Indeed Clause 1 of the (1951) Pension Plan directed that the trustees, in dealing with the trust funds, should act in accordance with the rules set out in the schedule. In the absence of any clause or rule permitting such a transfer, the trustees would have acted *ultra vires* the (1951) Pension Plan. He was therefore duly paid the benefits which accrued to him in accordance with the terms of the Deed.

There is no real prospect of claimant's claim that Kingston Wharves Limited unilaterally changed the terms of the (1951) Pension Plan succeeding. In the circumstances the claimant's claim that he is entitled to further payment is bound to fail.

The claimant's claim against the second defendant for negligence/breach of fiduciary duty in his capacity as the trustee of the Kingston Wharves Limited Pension Scheme is equally untenable. His chance of succeeding is indeed fanciful. The claimant was a trustee of the (1951) Pension Plan. He, like the second defendant, was also a trustee of the (1995) Pension Plan. Clause 11 of the (1995) Pension Plan states:

"No trustee shall be personally liable for any loss, damage or costs or expenses that may happen or be incurred in consequence of any act of omission or default of such Trustees whilst purporting to act as such unless he or she is guilty of actual fraud or dishonesty whereby loss or damage is sustained by the 1995 Pension Plan."

The clause plainly exempts trustees of the (1995) Pension Plan from liability except for fraud or dishonesty (which is not alleged). In any event, the second defendant was never a trustee of the (1951) Pension Plan. Significantly, the claimant was a trustee of the (1951) Pension Plan. He, and not the second defendant, was seized of the relevant facts and was in a position of influence. The second defendant was totally unconnected to the (1951) Pension Plan. All three Plans were governed by different Trust Deeds and Rules. His claim against the second defendant for negligence/breach of fiduciary duty is therefore completely misconceived and doomed ineluctably to fail.

Whether the Claimant has been compensated for work done on the Facility Fee Scheme

The first defendant, by way of letter dated the 29th June 2005, offered the defendant a six month period of consultancy. According to the said letter, upon the presentation of invoices, he would be compensated in the sum of \$972,000.00 per month. The claimant, in accordance with the terms stated in the said letter, duly presented the

first defendant with invoices for the sum of \$972,000.00 which detailed the consultancy work he performed during the month.

Revealingly, his invoices included work done on the Facility Fee project. Invoices dated 31st May 2007 and 30th June 2007 included as item (d), of each invoice, the following claim "*finalize implementation of the Facility Transaction Fee.*" Invoice dated 30th November 2007 included as item (c) the following claim "*Preparing various policy documents as directed by the chairman & CEO - Dividends & Facility Fees.*"

It is quite evident from invoices submitted by the claimant in compliance with the letter which contained the terms of his engagement (which he accepted), that he regarded the Facility Fee project as part of the consultancy agreement. His said invoices make it clear that the Facility Fee project was within the scope of the specific tasks assigned to him under the contract. In light of the clear evidence, any attempt by the claimant to prove that he was not duly remunerated for his work on the Facility Fee project is bound to fail.

In the circumstances:

- a. summary judgment in favour of the defendants;
- b. costs to be agreed or taxed.